No. 78-67

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the First Circuit

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BRIEF FOR THE BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in finding, after a full review of the record, that the National Labor Relations Board reasonably exercised its discretion to determine appropriate collective bargaining units in establishing a unit of full-time faculty at Boston University.

STATEMENT

Petitioner asks this Court to review findings of the National Labor Relations Board that the department chairmen at Boston University are not supervisors within the meaning of section 2(11) of the Act, and that the full-time faculty at the University, exclusive of the faculty of the schools of Law, Medicine and Graduate Dentistry, constitute an appropriate collective bargaining unit.

The foregoing findings are embodied in the Decision and Direction of Election issued by the National Labor Relations Board's Regional Director after a lengthy evidentiary hearing. (Pet. App. C77-C117) Relying, *inter alia*, on evidence that the chairmen's recommendations affecting the status of their faculty colleagues are invariably the product of consultation with at least the senior faculty in the departments, and that, moreover, such actions are frequently reviewed and reversed at higher administrative levels, the Regional Director concluded that the University's department chairmen are not supervisors:

> Based upon the above, particularly the facts that indicate collective rather than authoritarian action, most of which is not only reviewable on the higher administrative levels, but which in significant numbers of cases has been shown to be ineffective, it is found that department chairmen are not supervisors within the meaning of the Act. (Pet. App. C94-C95)

Relying on clearly established Board precedent, the Regional Director also concluded that a unit of full-time faculty exclusive of the faculty of the schools of Law, Medicine and Graduate Dentistry was appropriate.[1] With

[1] The Board has consistently held that a university's law or medical school faculty may be excluded from a faculty bargaining unit. *Fordham University I*, 193 NLRB 134 (1971); *New York University*, 205 NLRB 4 (1973); *Syracuse University*, 204 NLRB 641 (1973); *University of Miami*, 213 NLRB 634 (1974). Where a union seeks to represent a unit including the law school (no union has ever sought inclusion of the medical school faculty), and the law faculty seeks separate representation through its own agent, the law faculty is given the choice of representation in the wider unit, separate representation, or separate non-representation. See *e.g.*, *Syracuse University, supra.* The Board has also found a separate unit of law faculty appropriate in its own right. *Catholic University of America*, 205 NLRB 929 (1973); *University of San Francisco*, 207 NLRB 12 (1973). *Cf. Fairleigh Dickinson University*, 205 NLRB 673 (1973), where the Board permitted inclusion of the dental school faculty where a petitioning union sought their inclusion, and where no separate representation was sought.

regard to the medical and dental schools he noted that they were located in their own complex of buildings, "remote" from the main campus; that there was limited interchange with the main campus faculty; that both schools were operated "at least semi-autonomously with an additional body of trustees" (Pet. App. C114); that "they are separately budgeted, with little real direct financial support from the University" (*Id.*); and that their faculty generally enjoy salaries substantially higher than those of the main campus faculty. He concluded:

> In view of the foregoing factors, the absence of any bargaining history, the limited amount of faculty interchange and the fact that no labor organization seeks to include either the medical or dental faculty in a broader unit, it is found that the faculties of the School of Medicine and the School of Graduate Dentistry do not share a community of interest with the faculty of the schools on the Charles River Campus, that is so interwoven as to render their exclusion from the unit found appropriate herein, inappropriate. (Pet. App. C115).

With regard to the law faculty, the Regional Director, relying on evidence similar to that adduced in connection with the medical and dental faculty, held that:

> [A]s the law school faculty constitutes an identifiable group of employees whose separate community of interest is not irrevocably submerged in the broader community of interest which they share with other faculty members, it is found that either a university-wide unit, as otherwise modified herein, including the faculty of the law school, or a unit limited to the faculty of the law school, would be an appropriate unit for purposes of collective bargaining. Moreover, as no labor organization is seeking to represent its faculty separately, the School of Law is excluded from the unit found to be appropriate herein. (Pet. App. C110)

The Board denied review of the Regional Director's decision, and the AAUP (Boston University Chapter, American Association of University Professors) won the Board-supervised collective bargaining election. Petitioner thereafter refused to bargain on demand. The Board resolved the ensuing unfair labor practice charge on summary judgment and ordered Petitioner to bargain with the AAUP. (Pet. App. B57-B75) Petitioner then sought review in the Court of Appeals.

The Court of Appeals enforced the Board's order. Finding in the record a "firm footing to the Board's findings," it upheld the "Board's determination that the department chairpersons did not exercise supervisory authority over unit personnel and that whatever supervisory authority they did exercise over nonunit, support personnel was insufficient to render them supervisors * * *" (Pet. App. A43)[2] Concluding its own review of the rec-

[2] With respect to the chairmen's supervisory authority over nonunit support personnel, the Court of Appeals found ample support in the record for the Regional Director's finding that such activities consumed no more than five to ten percent of the chairmen's time. The Courts of Appeals have consistently affirmed Board decisions holding such minimal supervisory activity insufficient to support a finding of supervisory status. See *e.g.*, *NLRB* v. *Quincy Steel Casting Company*, 200 F.2d 293, 296 (1st Cir. 1952); *NLRB* v. *Security Guard Service*, 384 F.2d 143, 149, 151 (5th Cir. 1961); *NLRB* v. *Stewart Oil Co.*, 207 F.2d 8 (5th Cir. 1954). The Board continues to adhere to this view: *Automobile Club of Missouri*, 209 NLRB 614 (1974); *Amalgamated Clothing Workers*, 210 NLRB 928 (1974).

ord, the Court of Appeals held that with respect to each of a number of contested issues of fact regarding the nature and efficacy of the chairmen's recommendations "the Board was entitled to find that the chairpersons' recommendations were not 'effective' or that he/she was acting 'in the interest' of the faculty, not the employer." *Id.*[3]

The Court of Appeals also affirmed the Regional Director's findings with regard to the excludability of the law, medical and dental faculty. Noting, *inter alia*, the separate physical locations of the three schools, their separate administrative procedures, their distinct and separate graduation ceremonies, their significant independent financial resources, the substantially higher average salaries enjoyed by their faculty, and the significant differences in the tenure procedures of the three schools when compared with those employed in the rest of the University, the Court of Appeals concluded that, although alternative resolutions of this issue might also be reasonable, it could not say that the Board's decision was either "arbitrary or not based on substantial evidence." (Pet. App. A13)

ARGUMENT

1. Petitioner has advanced no basis for the grant of certiorari in this case. Asserting neither a conflict in the circuits nor that the decisions below are in conflict with applicable decisions of this Court, Petitioner is simply asking this Court to review and set aside the factual findings which underpin the Regional Director's unit de-

[3] Section 2(11) (29 U.S.C. § 152(11)) requires that in order for an individual to be classified a supervisor, he must exercise any of the enumerated indicia of supervisory authority "in the interest of the employer."

termination decision, findings which have been affirmed first by the Board and then, after a full review of the record, by the Court of Appeals.

a. This Court has long held that Congress granted the Board unusually broad discretion, under section 9(b) of the Act, to "decide in each case * * * the unit appropriate for the purpose of collective bargaining * * *." (29 U.S.C. § 159(b)). "[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.'" *South Prairie Construction Co.* v. *Operating Engineers*, 421 U.S. 800, 805 (1976), quoting *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947). Only where the "determination of a unit of representation is so unreasonable and arbitrary as to exceed the Board's power," should the courts intervene. *Packard Motor Car Co.* v. *NLRB*, *supra*, at 491-92. See also *May Department Stores Co.* v. *NLRB*, 326 U.S. 376, 380 (1945); *NLRB* v. *Jones & Laughlin*, 331 U.S. 416, 422 (1947).

Petitioner does not credibly assert that the Board's decision in this case is such as to warrant review under the foregoing standard.[4] The Board's treatment of the law, medical and dental faculties is fully consistent with its own precedent (see note 1, *supra*) and with its mandate to fashion an appropriate unit from among reasonable alternatives. *Pittsburgh Plate Glass Co.* v. *Labor Board*, 313 U.S. 146, 152 (1941); *NLRB* v. *Lerner Stores Corp.*, 506 F.2d 706, 707 (9th Cir. 1974); *Local 1325, Retail Clerks International Association* v. *NLRB*, 414 F.2d 1194, 1198-1199 (D.C. Cir. 1969).

[4] Instead, Petitioner suggests, without supporting authority (Pet. pp. 20-22), that the Board is entitled to no deference in this case because it has been inconsistent in its treatment of department chairmen and because its jurisdiction over higher education is just eight years old. This contention is clearly baseless. The Congressional grant of authority to the Board does not vary according to the length of time the Board has regulated an employment relationship. Moreover, as we show briefly below, the claim of inconsistency is insubstantial.

The Board's treatment of the chairmen issue is also well within its discretion and, contrary to Petitioner's assertion (Pet. pp. 20-21), is fully consistent with its own precedent. See, *e.g.*, *Fordham University I*, 193 NLRB 134 (1971); *New York University*, 205 NLRB 4 (1973); *Rosary Hill College*, 202 NLRB 1137 (1973); *Northeastern University*, 218 NLRB 247 (1975). The fact that the Board has sometimes excluded chairmen as supervisors is not, as Petitioner contends, evidence of any inconsistency. Rather it simply reflects differences in the evidence adduced in other cases,[5] and the factual complexities which typically surround the supervisor issue. These complexities are ones which the courts have consistently held are for the Board to resolve. See *e.g.*, *NLRB* v. *Swift & Company*, 292 F.2d 561 (1st Cir. 1961), cited with approval in *Marine Engineers Beneficial Ass'n.* v. *Interlake Steamship Co.*, 370 U.S. 173, 179, n.6 (1962); *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 18 (1st Cir. 1977); *Global Marine Development of California, Inc.* v. *NLRB*, 528 F.2d 92 (9th Cir. 1975), *cert. denied*, 429 U.S. 821. *Cf.*, *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 260 (1968).

b. Section 10(e) of the Act provides that the Board's findings of fact are "conclusive if supported by substantial evidence on the record considered as a whole . . ."

[5] See, for example, *Rensselaer Polytechnic Institute*, 218 NLRB 1435 (1975); *Syracuse University*, 204 NLRB 641 (1973); *Adelphi University*, 195 NLRB 639 (1972). Each of the foregoing cases is characterized by a firm Board finding that the chairmen in question possessed effective and independent authority to make major personnel recommendations. For a discussion of the Board's chairmen decisions, see Pollitt and Thompson, *Collective Bargaining on the Campus: A Survey Five Years After Cornell*, Industrial Relations Law Journal, Summer 1976, 231.

(29 U.S.C. 160(e)) As we have shown, the Petitioner's issues relate entirely to factual findings which were fully within the Board's discretion to reach. Petitioner cannot seriously contend that the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence test which governs judicial review of the Board's findings of fact. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). That being the case, there is no occasion for review by this Court:

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the hands of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. *Id.*

2. Since the decision of the Court of Appeals in this case, the Second Circuit has refused enforcement of a Board order requiring Yeshiva University to bargain with its faculty. *NLRB* v. *Yeshiva University*, Docket No. 77-4182, 98 LRRM 3245 (2d Cir., decided July 31, 1978) The Second Circuit concluded that the entire faculty at Yeshiva—because of their collective participation in matters of academic governance—were supervisory or managerial employees and as such not entitled to the Act's protections.

Though of undoubted significance to the ongoing application of the Act in higher education, the *Yeshiva* decision affords no basis for Court review of the instant case, since the issue on which it was decided has not been advanced here. The Second Circuit itself acknowledged that "no Court of Appeals has squarely determined the issue" resolved in *Yeshiva*, *viz*: "whether full-time faculty at a mature university are supervisors or managers under

the Act . . ." 98 LRRM 3253, n. 9.[6] The Second Circuit also stressed that it was addressing itself "solely to the situation" at Yeshiva and was not purporting to hold that all faculty at all "mature" universities are supervisory or managerial employees. *Id.*, 98 LRRM at 3252-3.

Petitioner has not contended that all of Boston University's faculty are supervisory or managerial employees. In fact, its expressed disagreements with the decision below are fundamentally inconsistent with any such contention. Petitioner argues that the appropriate faculty bargaining unit should include the faculty of the schools of Law, Medicine and Graduate Dentistry and exclude department chairmen on the ground that they exercise supervisory authority over other faculty. All of these contentions, which were at issue in the representation proceeding below and in the subsequent review by the Board and by the Court of Appeals, necessarily concede faculty to be covered employees within the meaning of the Act. Accordingly, however important the *Yeshiva* decision may be in its own right, it does not convert this case—involving, as we have shown, the application of settled principles of law to ordinary bargaining unit issues—into a case warranting this Court's review.

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[6] *Cf. NLRB* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). In *Wentworth Institute*, as the Second Circuit indicated, "the First Circuit simply rejected the Institute's argument that all faculty at all institutions of higher learning must be excluded from the Act's coverage. Limiting itself to the institution at hand, the court found that at Wentworth there was 'no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters.'" *Id.*, quoting in part from *NLRB* v. *Wentworth Institute*, 515 F.2d at 557.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 7, 1978